IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 24-11-1995.

CRIMINAL APPEAL NO. 53 OF 1989

For Approval and Signature:

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not ?

3. Whether Their Lordships wish to see the fair copy of Judgment ?

4. Whether this case involves substantial question of law as tothe interpretation of the Constitution of India, 1950 or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

Shri S.T. Mehta, Additional Public Prosecutor for the appellant.
Respondents served.

Coram: H.R. Shelat,J.
(24-11-1995)

ORAL JUDGMENT:

The respondents came to be acquitted by the then learned Judicial Magistrate, (First Class) at Khavada, on 28-11-1988 by delivering judgment in Summary Case No. 52 of 1986, and therefore the present appeal is before this Court by the State.

2. The case of the prosecution briefly stated is that the respondents, the Indian citizens, are the residents of Nana Dinara in the District-Kuchchh. As alleged by the prosecution on 2nd January 1985 at 15.00 hours riding over the camel, respondents entered into the border of Pakistan without any passport or obtaining any other document in his favour for the purpose of smuggling. After they came back they were arrested, as it was found that they had committed the offence punishable under Sections 3 and 12 of the Indian Passport Act read with Rule 3.6 of the Entry Into India Passport Rules, 1950. A complaint was then registered by the police officer at Khavada police

station. At the conclusion of the enquiry in that connection respondents came to be charge-sheeted before the Court of the learned Chief Judicial Magistrate at Bhuj who assigned the matter to the Judicial Magistrate at Khavada for hearing and disposal in accordance with law. The learned Magistrate then recorded the evidence and found that the prosecution had failed to establish the charge beyond reasonable doubt and therefore acquitted respondents. It is against that order the present appeal is filed before this Court.

3. At the time of hearing, though respondents were served no one appeared on their behalf. I therefore heard Mr. Mehta, the learned Addl. P.P. representing the appellant State. He submitted that learned Magistrate was not at all right in acquitting the respondents. Mr. Mehta laboured much to convince me so as to upset the findings of the learned Magistrate, but after going through the record carefully, I do not find any reason to accept the submission made by Mr. Mehta, the learned A.P.P.

4. In this case, the prosecution could examine only one witness, namely Hasam Sama. He has not supported the prosecution. According to him, respondents had not gone to Pakistan. He has been declared a hostile witness. But thereafter unfortunately no further evidence could be led by the prosecution so as to prove the charge. In view of the matter naturally for the learned Judicial Magistrate there was no option left but to acquit respondents. The order of acquittal in the absence of necessary evidence calls for no interference and the same is required to be maintained.

5. Faced with such situation, the learned A.P.P., submits that the lower Court ought to have adopted the coercive measure so as to secure the presence of other witnesses. When that was not done, instead of maintaining the order of acquittal, I may refer the matter back for retrial.

In support of such submission, Mr. Mehta relied upon the decision in the case of Gujarat Agro Industries vs. State of Gujarat & Anr.,- 21(2) G.L.R. 480 wherein it is held:-

"It was the duty of the Magistrate to have issued the process to procure the presence of the witnesses who were officers of the Corporation, and he should have also take steps, if need be, to issue further rigorous process to obtain their presence. In the present cause, the Magistrate has disposed of the matter by acquitting the accused, without taking a recourse to the provisions of the Code of Criminal Procedure for procuring the presence of the witnesses. He seems to have made a short-cut of

the matter by acquitting the accused only on the ground that the witnesses were not produced by the prosecution."

My attention was also drawn to another decision of this Court rendered in the case of State of Gujarat vs. Lohana Prakash Dayalji & Anr. [1994(1)] XXXV(1) G.L.R. 112, wherein pointing out the duty of Public Prosecutor, it is further observed :

"It is quite true that for whatever reason the prosecution has not examined the witnesses. But then having regard to the gravity of the alleged offences, the learned Magistrate should not have felt helpless in securing the presence of the witnesses before the Court in the public interest.It also appears from the record that the learned P.P. in-charge of the matter had submitted an application dated 2-2-1991 requesting the learned Magistrate to issue summons/warrant for examination of the witnesses, which unfortunately came to

be rejected. Under such circumstances, on the one hand not to issue summons/warrant for the purpose of examining the witnesses and on the other hand to say that despite the reasonable opportunity being given, the prosecution has not examined the witnesses, is not in good taste."

With his usual candour, learned A.P.P., also pointed out the decision in the case of The State of Gujarat vs. Rama Bahabhai Verchiram, 1984 Cri.L.R. (Guj.) 98, wherein it is held that when neither complainant nor witnesses are present, the court is not bound to adjourn the case, it will be justified in passing the order discharging the accused as it is for the prosecution to proceed with the complaint diligently. If the prosecution fails to keep the witnesses present, the court is not bound to grant adjournment.

6. By citing all the three decisions, Mr. Mehta, learned A.P.P. was, as I could see, in dilemma. The first two decisions are not in conflict with the last one cited. On the contrary, first two decisions are explorative to the gist, and help in discerning the law and its application to the given set of facts. There cannot be any reason for disagreement to the laudable principle enunciated in the first two decisions cited. The case cannot be hurriedly heard or throttled half way and brought to an end being obsessed with disposal mania; after all justice is the paramount consideration and no accused because of inaction, negligence, secret plot, lapse, deviation, foxiness, dishonesty, mischief, device or indolence and the like on the part of either of the parties or concerned agency, should be allowed to go scotfree or unpunished for want of evidence of the concerned witnesses. Hence, coercive measures must be resorted to and

presence of the witness can be secured for just adjudication so that the law, courts of law and administration of justice are not pooh-poohed and turned into bogle leading to dejection, and mockery. But the rule is not immitigable. The courts can deviate from such rule provided, assigning reasons in writing, they find that there is no reason to doubt the bonafides, and find fault with the party or his agent/agency on any of the aforesaid grounds; and further materials on record show that efforts will be unproductive or meaningless rather than serving useful purpose. Such is the law enunciated in the above referred three decisions.

7. A perusal of the Rojnama of the lower Court's record shows that several times the matter was adjourned; on few occasions owing to the absence of respondents, and on rest of the occasions absence of the witnesses. To secure the presence of witnesses summons were often issued and police sincerely tried its best to effect the services, but witnesses were not available. It was submitted before me that whereabouts and present addresses of witnesses could not be procured as no one could effectively assist the police. It is not the case of the prosecution that respondents were coming in the way while effecting the service. There is also nothing on record to show that the learned APP was inert or had joined hands with the other side. Mr. Mehta, learned APP could not unflinchingly say that evidence of other witnesses, if brought on record in whatever form available in police statement, would certainly help the prosecution. In view of this peculiar aspect of the case, I do not see any justification to direct lower Court to resort to all coercive measures available, in law, and so there is no justification to remand the case for a fresh trial. Under the circumstances, the order passed by the learned Judge below calls for no interference. The appeal thus fails. In the result, the appeal is hereby dismissed and the order of acquittal passed by the learned Magistrate below is maintained.

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